



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2015–0171; FF09E40000 167 FXES11150900000]

RIN 1018–BB25

Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Candidate Conservation Agreements with Assurances

AGENCY: U.S. Fish and Wildlife Service (FWS), Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS), revise the regulations concerning enhancement-of-survival permits issued under the Endangered Species Act of 1973, as amended (ESA), associated with Candidate Conservation Agreements with Assurances. We added the term “net conservation benefit” to the Candidate Conservation Agreements with Assurances regulations, and eliminated references to “other necessary properties” to clarify the level of conservation effort we require each agreement to include in order for us to approve a Candidate Conservation Agreement with Assurances. We also made these changes to the Candidate Conservation Agreement with Assurances policy in a separate document published in today’s **Federal Register**.

DATES: This rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: This final rule is available on the Internet at <http://www.regulations.gov> at Docket Number FWS–HQ–ES–2015–0171. Comments and materials received, as well as supporting documentation used in the preparation of this rule, are also available at the

same location on the Internet.

FOR FURTHER INFORMATION CONTACT: Jeff Newman, Chief, Division of Recovery and Restoration, U.S. Fish and Wildlife Service Headquarters, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703–358–2171.

SUPPLEMENTARY INFORMATION:

Background

Through its Candidate Conservation Program, one of the FWS’s goals is to encourage the public to voluntarily develop and implement conservation plans for declining species prior to them being listed under the ESA (16 U.S.C. 1531 *et seq.*). The benefits of such conservation actions may contribute to not needing to list a species, to list a species as threatened instead of endangered, or to accelerate the species’ recovery if it is listed. The FWS put in place a voluntary conservation program to provide incentives for non-Federal property owners to develop and implement conservation plans for unlisted species: Candidate Conservation Agreements with Assurances (CCAAs). On June 17, 1999, the policy for this type of agreement (64 FR 32726) and implementing regulations in part 17 of title 50 of the Code of Federal Regulations (CFR) (64 FR 32706) were made final. On May 3, 2004, we published a final rule (69 FR 24084) to revise the CCAA regulations to make them easier to understand and implement by, among other things, defining “property owner” and by clarifying several points, including the transfer of permits, permit revocation, and advanced notification of take.

To participate in a CCAA, non-Federal property owners agree to implement specific conservation actions on their land that reduce or eliminate threats to the species

that are covered under the agreement. An ESA section 10(a)(1)(A) Enhancement-of-survival permit is issued to the agreement participant providing a specific level of incidental take coverage should the property owner's agreed-upon conservation actions and routine property management actions (e.g., agricultural, ranching, or forestry activities) result in take of the covered species, if listed. Property owners receive assurances that they will not be required to undertake any conservation actions other than those agreed to if new information indicates that additional or revised conservation measures are needed for the species, and they will not be subject to additional resource use or land-use restrictions.

Based on our experience reviewing and approving CCAAs over the past 16 years, on May 4, 2016 (81 FR 26769), we proposed to change the regulations that clarify the level of conservation effort each agreement needs to include in order for FWS to approve an agreement and issue a permit. In addition to the clarification of the CCAA regulations, we also sought to better align the CCAA regulations with the Safe Harbor Agreement (SHA) regulations. Safe Harbor Agreements are a conservation tool for non-federal property owners that aid in recovery of listed species that are similar to CCAAs in that they also require a net conservation benefit. On May 4, 2016, we also published in the **Federal Register** a draft revised CCAA policy (86 FR 26817). We accepted public comments on the draft policy and proposed regulations until July 5, 2016. The comments we received are available at <http://www.regulations.gov> under Docket No. FWS–HQ–ES–2015–0171.

Changes from the Proposed Rule

Based on comments we received on the proposed rule and to further clarify the level of conservation effort a CCAA needs to meet, we include the following changes in this final rule:

(1) We revised the issuance criteria at 50 CFR 17.22(d)(2)(ii) and 17.32(d)(2)(ii) to include language indicating that a CCAA must provide a net conservation benefit consistent with the CCAA policy. The previous version of the regulations simply referred to compliance with the CCAA policy and did not specify that a CCAA must provide a net conservation benefit. Our intent is to be more clear and transparent about the level of conservation effort required for each CCAA to be approved; this change also better aligns the regulations with the CCAA policy. In addition, these changes help to accomplish our goal of aligning the CCAA regulations with the SHA regulations.

(2) In the draft regulations, we proposed revisions to the language on duration at 50 CFR 17.22(d)(8) and 17.32(d)(8) to include the full definition of “net conservation benefit” that we also included in the draft revised policy that was published in the **Federal Register** on the same date as the proposed regulations. To simplify these final regulations, we are not including the definition of net conservation benefit but state that the duration of a CCAA must be sufficient to provide a net conservation benefit to the covered species. The full definition of net conservation benefit is included in the final CCAA policy, which is published separately in today’s **Federal Register**. As with the above changes to the issuance criteria, these changes to the duration section help to accomplish our goal of aligning the CCAA regulations with the SHA regulations.

(3) We have made nonsubstantive editorial changes to the rule language at 50 CFR 17.22(d) and 17.32(d) to ensure consistent terminology and ease public understanding.

Summary of Comments and Recommendations

On May 4, 2016, we published a document in the **Federal Register** (81 FR 26769) that requested written comments and information from the public on the proposed revisions to the CCAA regulations. In that same **Federal Register**, we also published draft revisions to the CCAA policy (86 FR 26817). Since the majority of comments we received pertained to the draft policy, we have summarized the comments on both the proposed regulations and policy in the final policy document, which is published separately in today's **Federal Register**.

Purpose of Changes to Regulations at 50 CFR 17.22 and 17.32

We revised the CCAA regulations at 50 CFR 17.22(d) and 17.32(d) consistent with the revisions to the CCAA policy published separately in today's **Federal Register**. The regulation changes are to (1) include the term “net conservation benefit” to clarify the level of conservation effort that is necessary in order to issue a permit associated with a CCAA and (2) eliminate references to “other necessary properties.”

Under the original policy and regulations from 1999, to approve a CCAA we had to “determine that the benefits of the conservation measures implemented by a property owner under a CCAA, when combined with those benefits that would be achieved if it is assumed that conservation measures were also to be implemented on other necessary properties, would preclude or remove any need to list the covered species.” This language had led some property owners to believe that the FWS expected each individual

CCAA to provide enough conservation benefits to the species to remove any need to list the species. This confusion created by the hypothetical concept of conservation measures needing to be implemented on “other necessary properties” is why we are clarifying and revising the CCAA standard to require a net conservation benefit to the covered species specifically on the property to be enrolled and eliminating references to “other necessary properties.” In addition to clarifying the CCAA standard, through these changes we are also better aligning the CCAA regulations with the SHA regulations, as discussed above.

In concert with the revisions to our CCAA policy, published elsewhere in today’s **Federal Register**, these changes to the regulations will help reassure landowners participating in CCAAs that additional conservation measures above and beyond those contained in the CCAA will not be required, and that additional land, water, or resource use restrictions will not be imposed upon them should a species that resides on their property become listed in the future.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Management and Budget’s Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the

public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is consistent with E.O. 13563, and in particular with the requirement of retrospective analysis of existing rules, designed “to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his or her designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that this rule will not have a significant economic effect on a substantial number of small entities.

The rule revises the regulations governing issuance of an enhancement-of-survival permit in conjunction with a CCAA to clarify—but not change—current practice and does not place any new requirements on any non-Federal property owner that may seek to apply for approval of a CCAA.

Paperwork Reduction Act of 1995 (PRA)

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the PRA (44 U.S.C. 3501 et seq.). This rule will not impose new recordkeeping or reporting requirements on State, local, or tribal governments; individuals; businesses; or organizations. OMB has reviewed and approved the application form that property owners use to apply for approval of a CCAA and associated enhancement-of-survival permit (Form 3–200–54) and assigned OMB Control Number 1018–0094, which expires January 31, 2017. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.):

(a) On the basis of information contained in the *Regulatory Flexibility Act* section above, this rule would not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule would not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the rule

would not place additional requirements on any city, county, or other local municipalities.

(b) This rule would not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that is, this rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This rule imposes no obligations on State, local, or tribal governments.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this rule would not have significant takings implications. This rule would not pertain to “taking” of private property interests, nor would it directly affect private property. A takings implication assessment is not required because this rule (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This rule would substantially advance a legitimate government interest (conservation and recovery of endangered and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this rule would have significant Federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to approving enhancement-of-survival permits in conjunction with a CCAA under the ESA, and would not have substantial direct effects on the States, on the relationship between the Federal

Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This rule would clarify the issuance criteria for an enhancement-of-survival permit associated with a CCAA under the ESA.

Government-to-Government Relationship with Tribes

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951), Executive Order 13175, and the Department of the Interior’s manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have considered possible effects on federally recognized Indian tribes and have determined that there are no potential adverse effects of issuing this rule. Our intent is to provide clarity in regard to the net conservation benefit requirements for a CCAA to be approved, including any agreements in which Tribes may choose to participate. We will continue to keep our tribal obligations in mind as we implement this rule.

National Environmental Policy Act

We analyzed the regulations in accordance with the criteria of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality’s Regulations for Implementing the Procedural Provisions of NEPA (40 CFR 1500–1508), and the Department of the Interior’s NEPA procedures (516 DM 2 and 8; 43

CFR part 46) and determined that the regulations are categorically excluded from NEPA documentation requirements consistent with 40 CFR 1508.4 and 43 CFR 46.210(i). This categorical exclusion applies to policies, directives, regulations, and guidelines that are “of an administrative, financial, legal, technical, or procedural nature.” This action does not trigger an extraordinary circumstance, as outlined in 43 CFR 46.215, applicable to the categorical exclusion. Therefore, the regulations do not constitute a major Federal action significantly affecting the quality of the human environment.

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

2. Amend § 17.22 as follows:

- a. In paragraph (d)(1), introductory text, at the end of the heading, add “(CCAAs)” before the period and, in the second full sentence, remove “Candidate Conservation Agreement with Assurances” and add in its place “CCAA”;
- b. In paragraphs (d)(1)(iii) and (d)(2)(i), remove “Candidate Conservation Agreement” and add in its place “CCAA”;
- c. Revise paragraph (d)(2)(ii) to read as set forth below;
- d. In paragraphs (d)(2)(iv) through (vi), (d)(3)(i) and (iii), and (d)(4), remove “Candidate Conservation Agreement” each time it appears and add in their place “CCAA”;
- e. In paragraph (d)(5), introductory text, and paragraph (d)(6), remove “Candidate Conservation with Assurances Agreement” each time it appears and add in their place “CCAA”; and
- f. Revise paragraph (d)(8) to read as set forth below:

§ 17.22 Permits for scientific purposes, enhancement of propagation or survival, or for incidental taking.

* * * * *

(d) * * *

(2) * * *

(ii) The implementation of the terms of the CCAA is reasonably expected to provide a net conservation benefit to the affected covered species by contributing to the conservation of the species included in the permit, and the CCAA otherwise complies with the Candidate Conservation Agreement with Assurances policy available from the Service;

* * * * *

(8) *Duration.* The duration of a CCAA covered by a permit issued under this paragraph (d) must be sufficient to achieve a net conservation benefit to the species covered by the permit and the Agreement and otherwise comply with the Candidate Conservation Agreement with Assurances policy available from the Service.

* * * * *

3. Amend § 17.32 as follows:

a. In paragraph (d)(1), introductory text, at the end of the heading, add “(CCAA)” before the period and, in the second full sentence, remove “Candidate Conservation Agreement with Assurances” and add in its place “CCAA”;

b. In paragraphs (d)(1)(iii) and (d)(2)(i), remove “Candidate Conservation Agreement” and add in its place “CCAA”;

c. Revise paragraph (d)(2)(ii) to read as set forth below;

d. In paragraphs (d)(2)(iv) through (vi), (d)(3)(i) and (iii), and (d)(4), remove “Candidate Conservation Agreement” each time it appears and add in their place “CCAA”;

e. In paragraph (d)(5), introductory text, and paragraph (d)(6), remove “Candidate Conservation with Assurances Agreement” each time it appears and add in their place “CCAA”; and

f. Revise paragraph (d)(8) to read as set forth below:

§ 17.32 Permits—general.

* * * * *

(d) * * *

(2) * * *

(ii) The implementation of the terms of the CCAA is reasonably expected to provide a net conservation benefit to the affected covered species by contributing to the conservation of the species included in the permit, and the CCAA otherwise complies with the Candidate Conservation Agreement with Assurances policy available from the Service;

* * * * *

(8) *Duration.* The duration of a CCAA covered by a permit issued under this paragraph (d) must be sufficient to achieve a net conservation benefit to the species covered by the permit and the Agreement and otherwise comply with the Candidate Conservation Agreement with Assurances policy available from the Service.

Dated: December 20, 2016

Signed: Daniel M. Ashe

Director, U.S. Fish and Wildlife Service.

Billing Code 4333–15

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